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In the

Supreme Court of the United States

October Term, 1959

FOOTE MINERAL COMPANY
Petitioner

vs.

MARYLAND CASUALTY CO.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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vs.

MARYLAND CASUALTY CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Foote Mineral Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on April 22, 1960.

CITATIONS TO OPINIONS BELOW

The Memorandum opinion of the District Court (R. 30A) is reported in 173 Federal Supplement page 925 and in the appendix hereto, *infra*, page 7a. The majority opinion of The Court of Appeals, adopting the opinion of the District Court, and the dissenting opinion are printed in appendix hereto, *infra*, page 1a, and reported in —— Federal 2nd ——.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 22, 1960. R., "Proceedings In the United States Court of Appeals for the Sixth Circuit"; Appendix, *infra* page 7a. Rehearing was denied on May 19, 1960. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Is a court authorized to insert in a policy of insurance a provision not appearing in the policy, and by reason of the inserted provision deny the liability of the Insurer?

Is a provision in a policy of insurance ambiguous (a) where in construing the provision Judges of the Court of Appeals differ as to its meaning, and (b) where the meaning attributed to a word as a common one is not found in dictionary definitions and (c) where the testimony of witnesses defining and applying the provision is conflicting?

Does the burden of showing the non-applicability of an exclusion clause in a policy rest upon the insured?

STATEMENT

Maryland Casualty Company for a premium in excess of $13,000 issued a policy of insurance to Foote Mineral Company protecting Foote Mineral Company against loss arising from an accident to an electric generator while the generator was "in use". At the time of the accident the generator was in operation for one of its periodic customary uses of grinding its own commutator, but was not being used for the production of direct current electricity, the principal purpose for which it had been

acquired. The District Court added to the insuring clause of the policy "*in use*" the phrase "*for the production of direct current electricity*", and denied Foote a recovery under its policy. The Court of Appeals "for the reasons set out in the opinion of the District Judge" affirmed his action, one Judge dissenting and filing an opinion expressing the view that the District Judge was in error in interpreting the policy and in adding the additional phrase, and giving his reasons therefor.

The District Court further held that if the generator was "in use" within the meaning of the insuring clause of the policy, nevertheless the purpose for which it was operating was a repair within the meaning of an exclusion clause of the policy excluding coverage while a machine was "undergoing repair."

The Court of Appeals adopted without other opinion, the opinion of the District Court, one Judge dissenting and giving his reasons therefor in an opinion holding that the machine was in use within the meaning of the policy and not undergoing repair.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals for the Sixth Circuit holding that the Court may add a condition not appearing in a policy of insurance to the policy is in conflict with the decisions of the Court of Appeals of other Circuits.

The Fifth Circuit in the case of *Fidelity & Casualty Co. of N. Y.* v. *Lott*, 273 F. 2d 500, declines to add to the word "use" as it appeared in the policy, the words "as a vehicle" (*ibid* 502).

The Ninth Circuit, in the case of *Koefer* v. *Georgia Casualty Co.*, 67 F 2d 309 declined to add the word "named" to the word "assured" (*ibid* 310) as it appears in the policy.

The Eighth Circuit, in the case of *Springfield Tire & Marine Insurance Co.* v. *National Fire Insurance Co.*, 51 F 2d 714, declined to add to a policy a provision voiding the policy in the event of a material increase in risk, (*ibid* 720 (8)) a provision not contained in the policy.

The Tenth Circuit, in the case of *Elsey* v. *Prudential Ins. Co.*, 262 F 2d 432, declines to "rewrite the policy" by inserting a new provision as to its effective date.

The Court of Appeals for the District of Columbia in the case of *American Insurance Company* v. *Keane*, 233 F 2d 354 said that it is "not empowered to make a new contract for the parties" (*ibid* 362) and declines to amend the contract by the insertion of a provision eliminating the effect of an exception.

The majority opinion holding that the Court may add a condition not appearing in the policy is also in conflict with prior decision of the Sixth Circuit Court of Appeals and with the decisions of the Courts of Tennessee.

The Court of Appeals for the Sixth Circuit in the case of *Constitution Indemnity Co.* v. *Lane*, 67 F 2d 433 *declined* to limit the meanings of the words "for any business purpose" to a purpose directly connected with the assured's auto repair garage business. This case originated in the Courts of Tennessee.

The Supreme Court of Tennessee in the case of *Edwards* v. *Travelers Ins. Co.*, 201 Tenn. 441 refused to insert words which qualified or restricted the word "used" to mean that the insured must be using the property legally, rightfully and with the consent of the owner.

The Tennessee Supreme Court in the case of *Wallace* v. *State Farm Auto Co.*, 187 Tenn. 692 also held that where the insurance contract is not ambiguous, the Court has the duty to apply to words used their ordinary meaning and neither party is to be favored in their construction.

While the exact factual situation of this case does not appear in the cases cited, each involves the question as to whether or not a court will "write in" a policy of insurance a provision not appearing in the policy either for the purpose of increasing or eliminating coverage. With the exception of the "opinion by adoption" in this case, this principle has been universally applied by all other Circuit Courts of Appeal. The problem is present in almost every policy of insurance. To permit an exception to the principle to stand in the Sixth Circuit is to limit the effectiveness of insurance contracts in the Sixth Circuit by approving such additions to or subtractions from policies as the courts may think the parties should have contracted for and so destroy their right to contract and the effectiveness of these contracts.

2. The decision of the Court below is thought to be erroneous. The term "in use" as it appears in the policy of insurance is not limited. The District Court in the opinion adopted by the Court of Appeals declares that the words "in use" to mean in use for a particular purpose — the production of direct current electricity, thus "writing in" a phrase not in the policy and so denying coverage. (R. 41A) This definition of the word "use" does not conform to any dictionary definition for there is no limitation to a particular purpose in any such definition.

While dictionary definitions are not always binding upon a court, "meanings which they do not embrace are not common" (*Aschen Brewer* v. *U.S.F. & G. Co.*, 292 U.S. 80 *ibid* p. 85). The "adopted opinion" applies as a common meaning a definition not found in a dictionary. The limitation in definition is not supported by applicable court decisions as to its meaning.

If the phrase "in use" is capable of definition by reasonable men in more than one way as it is used in a policy of

insurance, then it of necessity falls into the category of ambiguity. The dissenting opinion of Judge Holland defines clearly one reasoned view of the meaning of the term. The "opinion by adoption" defines another. (Appendix *infra* 2a)

Witnesses, if competent, disagree as to the meaning.

In this situation the rule is clear that the policy will be construed so as to "effectuate the insurance and not defeat it" (*Podoleford* v. *Fidelity & Casualty Co. of N. Y.*, 100 F 2d 606 *ibid* p. 614). So it appears that the decision of the Circuit Court of Appeals is erroneous not only for the reason that the court has inserted a clause not found in the policy but has also resolved an ambiguity contrary to established principles.

The Court in its "opinion by adoption" has also placed the burden upon the insured of showing that an exception to a policy is *not* applicable. The long established rule is to the contrary.

Again, in applying definition to a factual situation the court has given a meaning to a common word where the meaning is not found in the dictionary and applied the coined meaning so found to an ordinary repetitive *use* of the machine – the use being for the purpose of maintaining efficient operation. In the opinion of Judge Holland, dissenting, such a use could not be a repair nor is it a repair in the opinion of most of the witnesses testifying based upon their familiarity with the process involved. Various cases defining repairs differ in the meaning and application of the word. So that here again, in addition to placing the burden upon the insured to prove a negative i.e. that an exclusion is not applicable, the Court "by adoption" applies the word to a use of the machine and resolves all ambiguity against the insured, and in so doing releases a highly paid insurer from liability contrary to clearly established principles.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

M. W. EGERTON,
W. W. DAVIS,
Counsel for Petitioner.

June 1, 1960.

APPENDIX

(CAPTION)

No. 13,970

OPINION OF THE UNITED STATES COURT OF APPEALS

For The Sixth Circuit

(Decided April 22, 1960.)

Before: MARTIN and WEICK, Circuit Judges; HOLLAND, Senior District Judge.

MARTIN and WEICK, Circuit Judges. In this action brought by appellant under an insurance policy issued by appellee, recovery of damages was sought for alleged loss sustained by injury to a generator and motor. The United States District Judge dismissed the complaint.

The case was tried without the intervention of a jury. There was no dispute as to the amount of damages sustained by plaintiff-appellant as the result of an accident causing injury to its motor and generator; but there was sharp issue between the parties upon the question of liability.

The policy issued by the appellee covered in express terms loss from an accident occurring while the generator "is in use or connected ready for use * * *." The policy contained an express exception from liability while the "object is undergoing an insulation breakdown, test, *or is being repaired* or dried out." [Emphasis supplied.]

In a carefully prepared memorandum opinion, embracing findings and conclusions and a detailed description of the machinery and the use to which it was being put when the accident occurred, the District Judge found, in summation, that the generator had been "purchased and in-

stalled for the sole purposes of (1) generating and (2) transmitting direct current for use in manufacturing manganese metal, and it was not in use or connected ready for use at the time of the accident which caused the damage that is the subject of this suit." He concluded, moreover, that the generator was being "repaired" at the time of the accident and that the aforementioned exclusion provision of the policy therefore precluded recovery for the loss.

For the reasons stated by the trial judge, Honorable Robert L. Taylor, in his well-reasoned opinion [reported in 173 Fed. Supp. 925 (E. D. Tenn.)], the judgment of the district court is affirmed.

HOLLAND, Senior District Judge, dissenting.

This is a suit based on a contract of insurance. The defendant agreed with the plaintiff respecting loss from an accident to the General Electric and Westinghouse Motor Generator Set No. 2376471 while same was in use or connected ready for use, and agreed to pay for loss on same directly damaged by such accident. An accident to the generator did occur on April 11, 1956, while the policy was in force, and loss to the insured did occur by reason of the accident, the amount of which was stipulated.

Inquiry as to how the accident occurred is not material to the case, except in so far as it may throw light on whether the generator was in use as defined in the policy and whether the damage constituted repairs under the provisions of the Exclusion Clause in the policy.

Whether the work that was being done while there was a shut down of defendant's plant was accomplished carelessly, negligently, properly or otherwise, is not pertinent to this case. The ultimate purpose accomplished by this generator set was the furnishing of direct current to defendant's plant, and while the work was being done on

the generator the alternating current of electricity could not be delivered to the plant. And the work could not be accomplished without a shut down of plant activity generally. This was so because the defendant's plant could not do or perform the work for which direct current was absolutely necessary.

A decision was made by the plaintiff that the commutator in the generator should be ground and in order to do this there had to be a shut down of the activities of the plant, because the plant would not function without direct current, and direct current could not be produced while the commutator was being ground. There is no quarrel about the fact that such a decision was made. Whether it was a wise decision or not is not pertinent nor material to the case.

The gist of the case hinges around the inquiry as to whether the object insured, the generator, was in use under the language of the policy while this decision was being executed.

The defendant called in outside technical men to do the work. But whether this was wise or unwise is not material to the case, and no question is raised by the pleadings or proof.

The sole question on the first phase of the case is, was the generator in use under the policy language when the work was going on, and when the accident occurred.

The District Judge was so impressed by the ultimate purpose to be accomplished by this object, the creation of direct current of electricity, that he concluded that the object was not in use under the terms of the policy. With this I cannot agree.

On different occasions, one of which was after the policy was in force, the defendant made inspections of the generator, checking on its condition. The defendant was naturally very much interested in the generator being kept

in good condition against a possible accident, which might arise from a developing faulty condition. There was a mutual interest in the matter of this big forty-ton piece of machinery being kept in good condition. The plaintiff could not produce its product without direct current electricity, and the Insurance Company had a heavy contingent liability interest if an accident occurred, which would produce damages or loss to the insured.

The grinding of the commutator was the process used to keep the surface reasonably smooth, and a neglected roughened surface arising from the continued operation of the generator would decidedly increase the hazard or danger of a possible accident to the generator. Both parties were naturally concerned with keeping down the possibility of an accident to the generator, the plaintiff from the standpoint of keeping its production going and the defendant of attempting to avoid liability on the policy through an accident.

The defendant is properly charged with knowledge of the general construction of the commutator. Insurance of this type, with large premiums paid, would lead to no other conclusion. The very construction of the commutator was such that it could be readily ground and resurfaced. The grinding of the commutator, thus known to be necessary from time to time, was just as much a part of the status of this piece of machinery in this plaintiff's plant as its function when delivering direct current to the plaintiff's plant.

In order for the grinding to be done, the brushes in the generator had to be removed. New ones had not been put in, because the accident occurred before this would take place, but even if new brushes had been put in, before an accident, such would be consistent with the generator being in use under the policy terms. Likewise, had the grinding been completed before an accident, and had it been neces-

sary to undercut the mica strips, such would have been consistent with the generator being said to be in use under the policy terms.

Periodic inspection and keeping the generator, with necessary grinding of the commutator, in good order and in functioning condition, was contemplated as a part of the use of the generator under the terms of the policy in finally accomplishing the securing of direct current. Whether the machine was energized at the time of the accident, is entirely immaterial and irrelevant to the issues in this case.

The work that was being done on the generator in the grinding was altogether of a constructive nature to preserve this object insured in good working order. There had been no breakdown before the fatal day of April 11, 1950. Inspection of the generator prompted a decision to grind the commutator, and that which was done by the workmen before the accident and at the time of the accident was of this nature, and should not be considered and does not come within the Exclusion Clause of "being repaired" in the policy.

The facts of this case, when applied to the two parts of the Policy, which are the controversial clauses in the contract, mean simply this. When the generator was in action, running, and an accident occurred, the generator was in use. If it was not running, whether from a shut down for repairs, or because of a shut down in business, lack of orders, or what not, then it was not in use. At the time of the accident it was running. It was running or in action in the matter of the commutator being ground to obtain smoothness. It was not producing direct current for the plant's operations, but it was running; it was being operated in the process of grinding the commutator. The machine was so constructed and designed that the generator was to be in action, in use, when the commutator

needed grinding. The Insurance Company, through its servants and agents, knew this, or ought to have known this. The Insurance Company was interested and made five inspections at various times, in order to see if this very grinding, among other matters, was advisable to keep the generator in good order. If the plaintiff had refused to grind the commutator when the Insurance Company representative concluded that grinding should take place, I rather expect cancellation by the Insurance Company would have been warranted. This, however, is not in the case. There is a justifiable conclusion, however, under the facts in this case that the Insurance Company agreed with the decision made by plaintiff that a grinding of the commutator at this time was proper in the exercise of good judgment to keep the machine in good working condition.

Further and as to the Exclusion Clause as to repairs. The machine was being operated to accomplish the grinding of the commutator, according to the design and construction of the machine, when this accident occurred, and the grinding was constructively to keep the machine in good working condition. The generator was not idle, it was not shut down. Electrical energy was being used to keep it active, in order to accomplish the grinding, and this constructive preventive process was not repairing.

These conclusions which I state and which are warranted by the facts in the case, result not because the pertinent words are ambiguous. I do not depend upon any legal principle applicable to the interpretation of insurance contracts, justifying liberal or non liberal interpretation. These conclusions are reached with the words enjoying normal everyday definition.

I would reverse and remand with direction to enter a judgment for the plaintiff for the stipulated amount and costs.

(CAPTION)

ORDER OF THE UNITED STATES COURT OF APPEALS
For The Sixth Circuit
(Filed Apr. 22, 1960.)

Before: MARTIN and WEICK, Circuit Judges; HOLLAND, Senior District Judge.

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof; It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
United States Circuit Judge

(CAPTION)

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT
For the Eastern District of Tennessee, Northern Division

This case was transferred to this court by the United States District Court for the Eastern District of Pennsylvania, under Title 28, U. S. Code, 1404(a), for the convenience of the parties and the witnesses.

Plaintiff is a Pennsylvania corporation and the defendant a Maryland corporation. The amount in controversy is in excess of $10,000.00

The incident that caused the damages that are the subject of the suit, occurred in Tennessee on April 11, 1956. The Boiler and Machinery insurance policy which plaintiff claims covered the losses was issued and delivered by the defendant in Tennessee on January 5, 1955. Electro Manganese Corporation of Knoxville, Tennessee, was the original named assured. By Endorsement No. 9 dated March 16, 1956, Item No. 1 of the policy was amended to read "Foote Mineral Company," said company having previously purchased all of the assets of the Electro Manganese Corporation.

The policy is described as a Boiler and Machinery Policy which insured plaintiff against loss by accident of objects described in detail in schedules 1 and 2 and the amendments thereto.

Schedule No. 1 is entitled "Electrical Machines." The items insured were divided into groups. Group No. 1 insured "Electrical Generators of 50 kw or larger and Electric Generators used as Exciters." One of these generators, which was a 1500-kilowatt Westinghouse, was greatly damaged as a result of an explosion while its commutator was being ground on April 11, 1956 by a representative of the Westinghouse Electric Corporation of Atlanta, Georgia.

Group No. 2 of Schedule No. 1 insured "Electric Motors of 70 h.p. or larger." One of the motors described in this group, and the one which was attached to the damaged generator, was completely destroyed by fire at the time of the incident which caused damage to the generator.

The original complaint sought to recover damages in the amount of $34,101.15 for injuries to the generator and motor, but after a fire insurance company paid plaintiff the sum of $14,453.06 damages for the loss of the motor, the claim under this item was reduced to $19,648.09.

The policy also insured against loss for partial prevention of business caused by accident under what is termed the "Use and Occupancy" endorsement. This item amounted to $56,790.67.

There is no dispute as to the amount of damages sustained by plaintiff as a result of the accident. Counsel for the defendant stipulated during the trial that the generator was damaged in the sum of $19,648.09 and that the damage caused by partial prevention of business while the generator was being replaced was $56,790.67.

The insuring agreement provides, in pertinent part, as follows:

> "In consideration of the Premium, the Company agrees with the Assured respecting loss from an Accident, as defined herein, occurring during the Policy Period, to an Object, as defined herein, while the Object *is in use or connected ready for use* . . ." (Emphasis supplied.)

Defendant contends that the generator was not in use or connected ready for use at the time of the incident causing the damage, and that it is not liable to the plaintiff for the loss. Plaintiff contends that the generator was in use or at least connected ready for use at the time of the accident and that the loss was covered by the policy.

Special Provision D(a), under Schedule No. 1, provides:

> "The Company shall not be liable for loss from an Accident to any Object which is designated and described in this Schedule while said Object is undergoing an insulation breakdown test, *or is being repaired* or dried out." (Emphasis supplied.)

Defendant further contends that it is not liable to plaintiff for the damages to the generator because it was being repaired at the time of the incident causing the damages. Plaintiff contends that the work being done on the gen-

erator at the time of the accident was preventive maintenance and that the foregoing exclusion does not prevent recovery.

The policy definition of an accident is as follows:

> "C. As respects any Object which is designated in this Schedule, 'Accident' shall mean
>
> "1. A sudden and accidental breaking of the Object, or any part thereof into two or more separate parts, but not the breaking of any shear pin, safety link, vacuum tube, gas tube, fuse, brush or insulation, nor the loosening of any assembled parts;
>
> "2. A sudden and accidental burning out of the Object, or any part thereof, but not the burning out of insulation unless accompanied by a short-circuit, or of any vacuum tube, gas tube, fuse or brush; or
>
> "3. A sudden and accidental deforming of any shaft of the Object, not caused by the cracking of such shaft."

A description of the generator on which the work was being done at the time of the accident and a detailed explanation of such work, will be helpful to an understanding of the problems that are under consideration.

A schematic drawing showing the component parts of a generator similar to the one involved in the accident is filed in the record.

The generator consisted of a number of enclosed coils of copper wire called the armature, which armature was attached to a shaft and revolved on that shaft in a magnetic field produced by magnets which surrounded the armature with the magnets being held in place by the outside plate of the generator. On the same shaft and immediately adjacent to the armature was a circular metal ring made in segments, which segmatic ring is known as a commutator. The segments, or commutator bars, were connected with the ends of the coils of copper wire composing the

armature. Brushes made of carbon and held by brush holders pressed against the commutator. The function of the brush holders was to hold the carbon brushes in position at the correct angle against the commutator and to maintain the necessary brush pressure on the commutator. The shaft to which was attached both the armature and commutator was coupled to a motor which caused the shaft to rotate and the armature fixed to it to revolve in the magnetic field produced by the magnets surrounding the armature, and electric voltage was thereby produced. This electric voltage was then transmitted to the commutator from the coils of wire composing the armature. In the commutator the electric voltage thus transmitted to it was converted into direct current and was then transmitted from the commutator by the carbon brushes held by the brush holders.

Carbon brushes, in the process of generating electricity, press against the outer surface of the commutator causing wear and deterioration to the brushes as well as the outer surface of the commutator. The commutator surface, after prolonged use, becomes grooved, rough and scarred, uneven and pitted, and out-of-round, which if not corrected will ultimately result in a breakdown of the generator. When a scarred or roughened condition develops, it is necessary to eliminate the scars and pits and to true up the surface of the commutator, thus restoring it to a sound and good working condition. Some generators require grinding at periods of from around four to six months while others last for years. The conditions under which the generator is operated control the frequency or infrequency of the grinding periods. The generator in question was ground at periods of six months to one or two years. It was installed in 1943 and continued in use until the time of the accident.

One arm that holds a set of brushes was removed to

mount the precision grinding machine. The damaged machine and the other machine covered by the insuring agreement were closed down on April 10, 1956 in order for the work to be done. The grinding started about 10:30 a.m. on April 11th and the accident occurred about 12:30 p.m. The work had not been completed at the time of the accident. The machine was not to return to service until the work was completed. No current was going to the cell room from the generator at the time of the accident.

The use to which the generator was put was "to convert the commercially available alternating current into the direct current necessary for the operation of electrolytic cells for the production of manganese metal." This fact is stated in Section IX of the complaint and is confirmed by the proof.

Immediately before the accident, mechanic Cantrell observed sparks flying from the generator. This was called to the attention of Aycock, the Westinghouse representative, who discontinued the work to observe the flying sparks. About the time he quit grinding a loud explosion occurred. At that time, or about that time, a fire started in the region of the motor.

In addition to the grinding of the commutator, Aycock was to install a new set of brushes, seat them to the commutator surface and undercut mica strips between the commutator bars.

The generator was not on the line at the time this work was being done. The circuit breaker located between the generator and cell room was open; all of the 320 brushes were removed; one brush holder arm was removed and the precision grinding instrument was installed in its place. The generator was disconnected so it was incapable of furnishing power to the cell rooms to manufacture manganese metal. The generator was neither in

use nor was it connected for use after it was taken off of the line on April 10, 1956.

Before the generator could have returned to use it would have been necessary to complete the grinding, restore the brush holder arm, install a complete set of carbon brushes, reseat the brushes, remove any copper dust that may have settled on or around the machine incident to the grinding of the commutator. This procedure would have taken several hours. The generator was incapable of supplying electric current to the cell rooms after the carbon brushes were removed from the generator.

As previously indicated, plaintiff contends that the generator was in use or at least connected ready for use at the time of the incident as it was part of a set consisting of the exciter, motor, and generator; that the exciter was energized and the motor was being run by alternating current furnishing a mechanical power to rotate the shaft so that the commutator of the generator could be resurfaced with the precision grinding instrument.

Plaintiff further contends that precision grinding of the commutator was one of the uses for which the generator was purchased, and that such use was in contemplation of the parties to the contract.

Plaintiff also insists that this as at least a reasonable interpretation of the language of the policy, and that since it is subject to more than one interpretation, that the interpretation which is most favorable to the insured must be made.

The parties agree that the interpretation of the policy is controlled by Tennessee law: 56-1102 T.C.A. Kustof v. Stuyvesant Insurance Co., 160 Tenn. 208; King v. Mutual Life Insurance Co. of N. Y., 114 F. Supp. 700.

If the language in the policy is ambiguous so as to create doubt or uncertainty of meaning, the Court should adopt the construction most favorable to the insured.

Alsop v. Insurance Company, 196 Tenn. 346. It should be interpreted so as to carry out the intention of the parties. Harris v. State Farm Mutual Automobile Insurance Co. (6th CCA), 232 F. 2d 532.

Another rule is that the language of a policy must be construed according to its plain, ordinary and popular meaning unless by some known usage it has acquired a different meaning or unless it was the intention of the parties to the contract to use it in a technical or peculiar sense. Bond-Sanders Paper Co. v. Travelers Insurance Co., 12 Tenn. App. 479; Seay v. Georgia Life Insurance Co., 132 Tenn. 673; Travelers Insurance Co. v. Ansley, 22 Tenn. 456, and Harris v. State Farm Mutual Automobile Insurance Co., supra.

The language "in use or connected ready for use," is not obscure. Its meaning is plain. Words and Phrases states one of the most common meanings of the word "use" as defined by Webster, is "usefulness, utility advantage, productive of benefit."

Webster's New International Dictionary, Second Edition, defines it as: "1. Act of employing anything, or state of being employed; application; employment; as, the use of a pen, his machines are in use."

Words and Phrases gives the following meaning for the word "connect": "To join, or fasten together as by something intervening; . . . to unite or link together, as in an electrical circuit."

Webster's New International Dictionary, Second Edition, gives as the first meaning, "1. To join, or fasten together as by something intervening whether physically or logically; as to connect towns together by a railroad; to unite or link together, as in an electrical circuit."

The Court is of the opinion that the language "in use or connected ready for use" was used by the parties to the contract in its ordinary, common and popular sense

Wallace v. State Farm Mutual Automobile Insurance Co., 187 Tenn. 692, 701; Sadler Machinery Co. v. Ohio National, Inc., (6th CCA), 202 F. 2d 887, and Lattimore v. Merchants Fire Assurance Corporation, 151 F. Supp. 396, 399.

The usual and ordinarily understood meaning of an object being "in use" is when said object is being used for the purpose for which it was designed. Leet v. Hays, (Iowa), 233 N. W. 481, 484. The generator was not "in use" for the purpose for which it was designed at the time of the accident.

The motor and generator that were involved in the accident were referred to in the declaration as a "set," but in Schedule No. 1 the generators and motors were listed as separate objects. The generators were covered in Group No. 1, and the motors in Group No. 2.

The motor was performing the function of driving the generator at the time of the accident. The generator was not producing direct current. This was the purpose for which it was designed, or as the experts sometimes stated, it was not converting alternating current into direct current, for use in the electrolytic cells for the manufacture of manganese metal.

At the time of the accident the generator was not connected with the cells. The brushes which were designed to take the current from the commutator to the bus bars were disengaged, and in the language of the witnesses "the machine was off the line."

In summary, the 1500-kilowatt, 250-volt, generator was purchased and installed for the sole purposes of (1) generating and (2) transmitting direct current for use in manufacturing manganese metal, and it was not in use or connected ready for use at the time of the accident which caused the damage that is the subject of this suit.

The proof shows that the hazards are greatly increased when work is being done on the generator.

The proof further shows that it is not feasible — if not impossible — to grind a commutator while the generator is in use or connected ready for use. There is danger of the workmen permitting some tool to come in contact with the machine, and there is the danger to the workmen themselves. These are hazards which do not exist while the generator is in use. Payment of a larger premium is required for coverage while the generator is not in use or connected ready for use. Premium was not paid for the coverage contended for by plaintiff in this case.

We now come to the second and final question involved in the suit. That is, whether the machine was undergoing repairs at the time of the accident. In view of the holding that plaintiff's loss was not covered by the policy, the only purpose in passing on this question is to have the record complete in the event of an appeal.

Plaintiff contends, as heretofore stated, that the machine was undergoing preventive maintenance at the time of the accident; that the parties contemplated such maintenance at the time the contract was written, and that the terms of the policy are sufficient to insure against loss while the work was being done.

The defendant contends that the word "repair" as used in the policy is a common word and connotes the ordinary, plain and popular meaning of that word; that the word as used in the policy does not have a meaning in the electrical industry different from its meaning in other industries. The proof is sharply divided on this issue.

The witnesses introduced by the plaintiff testified that the words "repair" and "maintenance" have a technical and distinctive meaning in the electrical industry, while the witnesses for the defendant testified that these words

have the same meaning in the electrical industry as they do in other businesses.

Plaintiff's witnesses expressed the view that the word "repair" applies only to situations where a machine has suffered a complete breakdown and that some part, or parts, must be replaced because of having been severed or broken. "Maintenance," according to them, is that which periodically occurs. Repair has an element of the unexpected in it. Maintenance is planned for while repair is not. Repair is something unexpected; maintenance is something you see ahead.

Witnesses for the defendant were of the opinion that repair is fixing worn out parts or defects caused by breaks. Maintenance is doing something to preserve the machine. Repair does not include cleaning and periodic inspections; while maintenance does include cleaning and periodic inspections and, as one witness put it, this is the only difference between the two terms. This same witness classified "repair" as everything done while the machine is out of service; while "maintenance" does not require the machine to be taken out of service while the work is being done.

The courts have sometimes construed the terms "maintenance" and "repair" as equivalents. Maintenance has been construed to include repair. Tennessee Electric Power Co. v. White County, (6th CCA), 52 F. 2nd 1065.

If the word "repair" has a restrictive meaning in the electrical industry, the burden was upon plaintiff to prove it. In E. E. Kelly & Co. v. U. S., the Court said:

> "If the word 'repairs' has a restricted meaning in the trade and commerce of the United States which excludes so-called maintenance painting, it was incumbent upon appellants to prove that fact by a preponderance of the evidence. Furthermore, it is elementary that the evidence must show that such restricted trade meaning is uniform, definite, and gen-

eral, and not partial local, or personal." 17 C.C.P.A. 30, 33.

The Court is of the opinion that the word "repair" was used in the contract in its common, plain and popular sense and that it is not ambiguous. An ambiguity does not arise in a contract by reason of the parties to the contract differing as to the interpretation of various provisions. American National Bank v. Service Life Insurance Co., (7th CCA), 120 F. 2d 579, 582.

If there is no ambiguity in the contract, its interpretation becomes a question of law. Etna Life Insurance Co. v. Bidwell, 192 Tenn. 627, 630.

An insurance contract, like other contracts, should be construed according to the meaning of the terms as the parties used them in the contract. Wray v. Metropolitan Life Insurance Co., 19 Tenn. App. 535, 539.

If the language is clear, it is to be taken and understood in its plain and ordinary sense.

There is nothing obscure about the meaning of the word "repair" as used in the policy. It is not necessary to look to a particular business for its meaning. It is a common word with which ordinary people are familiar and with which they deal almost daily.

Webster's New International Dictionary, Second Edition, defines it as "to restore to a sound state, or good state after decay, injury, dilapidation or partial destruction; as to repair a house, a road or a shoe." In the Century Dictionary, 1936 Edition, "to restore to a good or sound condition, as decay or damage . . . restore, renovate or renew by any process of making good, strengthening, supplying . . . ."

That which was being done by Mr. Aycock on the generator at the time of the accident fits the foregoing definitions. It is the meaning which the ordinary person ascribes

to the term, and in the opinion of the Court it is this meaning that the parties had in mind when the contract was made.

The Court concludes that the generator was being repaired at the time of the accident and that the aforementioned exclusion provision of the policy precludes recovery for the loss.

Let an order be presented in conformity with the views here expressed

No. 145.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

FOOTE MINERAL COMPANY,
Petitioner,

vs.

MARYLAND CASUALTY COMPANY,
Respondent.

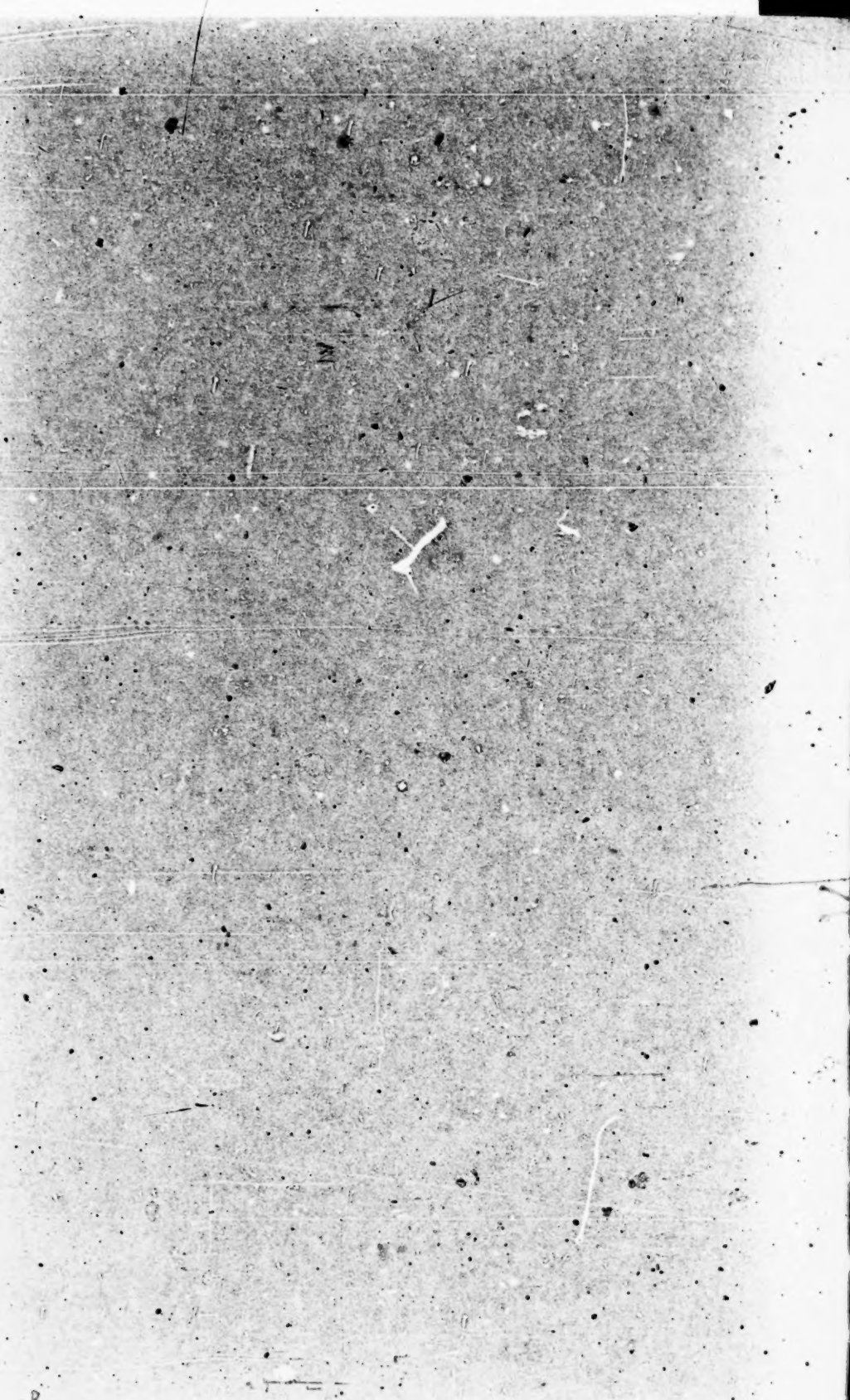
RESPONDENT'S BRIEF

In Opposition to the Petition for Certiorari.

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No. 145.

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RESPONDENT'S BRIEF

In Opposition to the Petition for Certiorari.

Respondent, Maryland Casualty Company, prays that the petition of the Foote Mineral Company for a writ of certiorari be denied.

QUESTION PRESENTED.

Respondent is dissatisfied with petitioner's statement of the question presented because not one of the several bases upon which the questions is predicated appears in the record. Nevertheless, petitioner's question, even as thus inaccurately posed, indicates that the two concurring decisions below turn solely upon the facts peculiar to this case, will affect few others except these particular litigants, and therefore should not be reviewed again.

Petitioner's statement of the question first infers that the Court of Appeals permitted the District Judge to insert an entirely new and additional provision in an insurance policy and thereby sanctioned the District Court's refusal to hold liable the insurance company which issued the policy. The record, however, denies that inference. The District Court added not a single word or phrase to the policy. The Court of Appeals merely concurred with the District Judge in his holding that because of the plain, ordinary and usual meaning of the phraseology in the policy, there was no insurance coverage under the facts.

Petitioner's statement of the question further infers that the Court of Appeals concurred with the District Court in holding that a portion of the insurance policy was "ambiguous." The record, however, likewise furnishes no support for that inference. The District Court did not hold any part of the policy to be ambiguous. On the contrary, the Court of Appeals concurred with the District Judge in his conclusion noted on pages 14a and 18a of the petition that the language of the policy is not obscure, is plain, and is not ambiguous.

Petitioner's statement of the question likewise infers that the Court of Appeals permitted the District Court to cast upon the petitioner "the burden of showing the non-applicability of an exclusion clause in a policy." Again the record denies that inference. The Court of Appeals merely concurred with the District Judge's conclusion that if petitioner claimed that a word in the insurance policy had a restricted or unusual meaning, a meaning other than its common, plain and popular meaning, petitioner had the burden of proving such restricted or unusual meaning. (p. 17a of the petition.)

Respondent submits that the sole question here before this Court is whether the same two questions which the

District Court decided, and in which decision the Court of Appeals concurred, shall again be reviewed.

The first question which the District Court answered in the negative, and in which answer the Court of Appeals concurred is: Was a direct electric current generator **in use**, in use within the meaning of an insurance policy protecting the insured against loss from an accident to the generator while it is "in use or connected ready for use," during the time the generator was not generating direct electric current, the purpose for which it was designed, having previously been rendered incapable of generating such electric current for a minimum period of the several existing hours following the physical removal from the generator of some of its vital component parts, and while several of its remaining parts were being operated in their usual manner in performing certain work on but one of the remaining parts?

The second question which the District Court answered in the affirmative, and in which answer the Court of Appeals likewise concurred, is: Was such an electric generator, **being repaired** within the meaning of the same insurance policy which further provided that the insurance company shall not be liable for an accidental loss which occurs while the generator is "being repaired," where at the time of the accident the generator was not then generating direct electric current, having previously been rendered incapable of doing so following the physical removal from the generator of some of its vital component parts, and although the circular metal surface of the generator's commutator (one part which had not been removed) was then being ground smooth by rotating the commutator at its usual speed against a grinding tool which had been temporarily attached to the generator for that purpose, thereby restoring the commutator to proper working condition after having become out of round and rough as a consequence

of previous use, such grinding of the commutator being necessary at irregular intervals?

Respondent submits that the answer which the courts below gave to the foregoing questions necessarily were dependent upon the facts peculiar to this particular case. Those answers are therefore significant only to the Foote Mineral Company and to the Maryland Casualty Company, and this case thus has no peculiar gravity or general importance. Respondent further submits, as hereinafter will be shown, that no Court of Appeals has rendered a decision in conflict with the decision in this case. Respondent consequently insists that the petition for certiorari should be denied.

STATEMENT OF THE CASE.

Respondent is likewise dissatisfied with petitioner's statement of the case. Being partially inaccurate, the statement is misleading. One inaccuracy is petitioner's statement that the policy protected against loss by accident to an electric generator, thus inferring that the policy covered only one piece of equipment. Actually, the policy protected against loss by accident to numerous pieces of equipment, the generator in question being but one of them.

Another such inaccuracy is petitioner's statement that "At the time of the accident the generator was in operation for one of its periodic customary uses, of grinding its own commutator . . . ." Such statement begs the question, because one of the two principal issues in this case is whether the generator was **in use** when the accident occurred. Petitioner's statement, therefore, takes for granted one of the very conclusions in dispute.

Another inaccuracy is petitioner's statement that, "The District Court added to the insuring clause of the policy

'in use' the phrase 'for the production of direct current electricity', . . ." and that the Court of Appeals affirmed such action. As previously mentioned, the record contains no basis for such a statement. Neither court below added a single word or phrase to the policy. The Court of Appeals merely affirmed the District Judge's action of declining with respect to context, in connection with the subject matter which was the electric generator, the phrase **in use** as it appeared in the insurance policy referring to the generator.

With the exception of the foregoing inaccuracies petitioner's statement of the case satisfies respondent.

ARGUMENT

The effect of petitioner's position that the court below yielded a condition which did not previously appear in the policy is that petitioner thereby insists that the Court of Appeals allowed the District Court to "write in" the policy a new limitation or restriction which previously had not been there. That insistence, however, is completely unsupported by both the facts of the case as well as by the District Court's opinion. In that opinion the District Judge merely held that the plain, ordinary and popular meaning of certain original language appearing in the policy (**in use** and **being repaired**) was not as broad and all-encompassing as petitioner would have had the court hold (pages 14a et seq. of the petition). Consequently such District Court holding, obviously, did not result in the inserting or writing into the policy of a condition, limitation, or restriction which had not previously been there. The opinion merely recognized the presence of a pre-existing limitation or restriction upon the meaning of the language in question, and which limitation or restriction resulted from the ordinary and popular understanding of that language.

In achieving the foregoing result, the court considered the facts of the case, as well as the language of the policy, by two rules of interpretation. The first of these rules was that the language of an insurance policy must be construed according to its plain, ordinary and popular meaning unless by some known usage it has acquired a different meaning, or unless it was the intention of the parties of the contract to use it as a technical or peculiar sense. The second rule which the court recognized was that the usual and ordinarily understood meaning of an object being "in use" is when said object is being used for the purpose for which it was designed (pages 14a and 15a of the

petitioner. The court further concluded that the meaning of the phrases **in use** and **being repaired** is not obscure, is plain and unambiguous (pages 18a and 19a of the petition). The court then found as a fact that the generator covered by the policy was designed to produce direct electric current (page 15a of the petition).

The court applied its foregoing findings of fact to its said conclusions of law and held that inasmuch as the generator was designed to produce direct current electricity, but was not being used for that purpose at the time of the accident, the generator was not then **in use** within the plain, ordinary, and popular meaning of the phrase **in use** (page 15a of the petition). The court, further held that when the particular facts of this case were measured by common, plain, and popular definition of the word **repair**, the generator was **being repaired** at the time of the accident within the common, plain, and popular understanding of the meaning of that word. Respondent submits that such process of reasoning by the court conclusively shows that it merely interpreted existing words in the policy and in no sense did it add any new condition to the policy which was not already there. The court only interpreted certain phraseology of the insurance contract, upon the meaning of which phraseology the parties differed, and attributed to that phraseology what the court found to be its plain, ordinary, and popular meaning. Respondent submits that because such plain, ordinary, and popular meaning, as thus found by the court, happens to be at variance with the meaning which petitioner would attribute to that phraseology does not result in the court having added a new condition to the policy. Consequently, the cases which petitioner cites as stating the settled rule that a court may not add a new condition to an insurance policy, rewrite it, and make a new contract for the parties, have no application to this case. The applicable rule is

that noted in the case of **Wallace v. State Farm Mutual Automobile Insurance Company**, 187 Tenn. 692 (1948), which case petitioner cites on page 4 of its petition, where the Tennessee Supreme Court said that if an insurance contract is not ambiguous the court has the duty to apply to the words used in it their ordinary meaning, and neither the insuror nor the insured is to be favored in the interpretation of such words.

Respondent further submits that the decision of the court below is just and equitable as well as correct. The insurance policy before the Court protected the insured against loss arising from an accident to certain specified equipment, which equipment included an electric generator, while the generator was **in use**, unless the generator was then **being repaired**. The policy therefore furnished only limited insurance coverage. For example, the policy did not purport to furnish protection against loss **arising out of the use** of any of the specified equipment as did the automobile policy considered in the case of **Fidelity and Casualty Company of New York v. Lott**, 273 Fed. 2d 500, which petitioner erroneously cites in support of its position. Furthermore, even if the generator were **in use** (was generating direct current electricity) upon the happening of an accident to it, no insurance coverage exists if the generator was simultaneously **being repaired**. A definite reason exists for such limited coverage. As the District Court found from the evidence, when the generator is being employed or used for any purpose other than generating direct electric current, or is being repaired, the hazard of an accident to the generator is thereby increased, and insurance against such increased hazard requires the payment of a larger insurance premium which petitioner had not paid (page 16a of the petition). Respondent consequently submits that for the court to have attributed to the words **in use** and **repair** a broader definition than

the usual, ordinary, and popularly understood meaning of those words as held and defined by the court would have been both incorrect as well as inequitable to the respondent Maryland Casualty Company.

The petition for certiorari should be denied.

Respectfully submitted.

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STUART F. DYE,
Counsel for Respondent

August 8, 1960.